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Fiona ak Rubin (the administratrix of the estate of Frank Harvey ak Frankie Riya (deceased)) v Hermansyah bin Amran

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-04(W)-157–04 OF 2021
RAVINTHRAN, CHE MOHD RUZIMA AND AZMI ARIFFIN JJCA
3 APRIL 2024

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Tort — Negligence — Road accident — Accident took place whilst motorcyclist plaintiff and motorist defendant were negotiating bend on the road — Whether trial court and High Court on appeal were right in concluding that liability should be apportioned equally between the partiesso

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Frank Harvey ak Frankie Riya ('the deceased') died as a result of a road accident in which the motorcycle he was riding collided with a car driven by the respondent. The accident took place whilst both parties were negotiating a bend on the road. The perplexing question was to determine who had
E encroached into whose lane. After taking into account all the evidence, the sessions court apportioned liability 50:50 between the parties and awarded damages on that basis. Dissatisfied with the decision, the administratrix of the deceased's estate (the appellant) appealed to the High Court. The respondent filed a cross-appeal. Dismissing both the appeal and cross-appeal, the High
F Court affirmed the trial court's decision on liability and quantum but ordered interest to run at 5%pa: (a) on special damages from the date of the accident until date of judgment; (b) on general damages from the date of service of the summons until date of judgment; and (c) on the total judgment sum from the date of the judgment until date of full settlement. In the instant appeal, the
G appellant argued that the High Court was wrong not to have interfered with the trial court's findings on liability and quantum.

Held, unanimously dismissing the appeal on liability and partly allowing the appeal on quantum:

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(1) After studying the relevant documentary evidence and the submissions of the parties, this court found no misdirection on the part of the High Court judge as regards liability to warrant appellate intervention. There was no reason to disturb the well-reasoned findings of the trial court and
I the High Court on liability (see para 15).

(2) In addition to the receipted expenses granted by the courts below, this court was of the view that un-receipted expenses for the funeral, such as prayer expenses, should be granted by taking judicial notice of the same.

Accordingly, the sum of RM5,000 was granted for this item. The other expenses granted by the courts below were affirmed and maintained (see para 18).

(3) The trial court erred in using a multiplicand of RM900 to assess loss of dependency and also erred in making a one-third deduction for vicissitudes of life which had been built into the multiplier. A sum of RM349 should be added to what the deceased gave his wife as it was directly paid to her by the Army. On the evidence, after taking into consideration this sum and the roughly RM1,000 paid to the widow for expenses, the multiplicand should be RM1,350. The appellant was entitled to 50% of the above having regard to the equal apportionment of liability. The final judgment sum was to reflect the above variation (see paras 19 and 20).

[Bahasa Malaysia summary

Frank Harvey ak Frankie Riya ('si mati') maut akibat kemalangan jalan raya di mana motosikal yang ditungganginya bertembung dengan kereta yang dipandu responden. Kemalangan itu berlaku ketika kedua-dua pihak sedang teragak-agak ketika mengambil selekoh di jalan raya. Persoalan yang membingungkan adalah untuk menentukan siapa yang telah menceroboh lorong siapa. Selepas mengambil kira semua keterangan, mahkamah sesyen membahagikan liabiliti 50:50 antara pihak dan memberikan ganti rugi atas dasar itu. Tidak berpuas hati dengan keputusan itu, pentadbir harta pusaka si mati (perayu) merayu ke Mahkamah Tinggi. Responden memfailkan rayuan silang. Menolak kedua-dua rayuan dan rayuan silang, Mahkamah Tinggi mengesahkan keputusan mahkamah perbicaraan mengenai liabiliti dan kuantum tetapi mengarahkan faedah berjalan pada 5% setahun: (a) atas ganti rugi khas dari tarikh kemalangan sehingga tarikh penghakiman; (b) atas ganti rugi am dari tarikh penyampaian saman sehingga tarikh penghakiman; dan (c) atas jumlah jumlah penghakiman dari tarikh penghakiman sehingga tarikh penyelesaian penuh. Dalam rayuan semasa, perayu berhujah bahawa Mahkamah Tinggi adalah salah kerana tidak mengganggu keputusan mahkamah perbicaraan mengenai liabiliti dan kuantum.

Diputuskan, menolak rayuan atas liabiliti dan sebahagiannya membenarkan rayuan atas kuantum:

(1) Selepas mengkaji keterangan dokumentari yang berkaitan dan hujahan pihak-pihak, mahkamah ini mendapati tiada salah arah di pihak hakim Mahkamah Tinggi berkenaan liabiliti untuk mewajarkan campur tangan rayuan. Tiada sebab untuk mengganggu dapatan mahkamah perbicaraan yang munasabah dan Mahkamah Tinggi mengenai liabiliti (lihat perenggan 15).

(2) Sebagai tambahan kepada perbelanjaan dengan resit yang diberikan oleh mahkamah di bawah, mahkamah ini berpendapat bahawa perbelanjaan yang tanpa resit untuk pengebumian, seperti perbelanjaan sembahyang, hendaklah diberikan dengan mengambil notis kehakiman mengenai perkara yang sama. Sehubungan itu, sejumlah RM5,000 telah diberikan untuk item ini. Perbelanjaan lain yang diberikan oleh mahkamah di bawah telah disahkan dan dikekalkan (lihat perenggan 18).

(3) Mahkamah perbicaraan terkhilaf menggunakan gandaan RM900 untuk menaksir kehilangan pergantungan dan juga terkhilaf membuat potongan satu pertiga untuk perubahan kehidupan yang telah dimasukkan ke dalam pengganda. Sejumlah RM349 perlu ditambah kepada apa yang diberikan oleh si mati kepada isterinya kerana ia telah dibayar terus kepadanya oleh Tentera Darat. Berdasarkan keterangan, selepas mengambil kira jumlah ini dan kira-kira RM1,000 yang dibayar kepada balu untuk perbelanjaan, gandaan hendaklah menjadi RM1,350. Perayu berhak mendapat 50% daripada perkara di atas dengan mengambil kira pembahagian liabiliti yang sama rata. Jumlah penghakiman terakhir adalah untuk mencerminkan variasi di atas (lihat perenggan 19 dan 20).]

Cases referred to

Ahmad Zulfendi bin Anuar v Mohd Shahril bin Abdul Rahman [2022] 4 MLJ 892, CA (folld)

Muhammad Nur Aizzat bin Mohd Yunos v Amir Hamzah bin Abd Razak & Ors [2023] 3 MLJ 379, CA (refd)

Appeal from: *Fiona ak Rubin (the administratrix of the estate of Frank Harvey ak Frankie Riya, deceased) v Hermansyah bin Amran* [2021] MLJU 796 (High Court, Kuching)

Sarbjit Singh Khaira (with Ningkan ak Hamilton) (Khaira & Co) for the appellant.

Bartholomew Lopez (with Aaron Lim Li Peng) (Gala and Tomik) for the respondent.

Azmi Ariffin JCA:

INTRODUCTION

[1] Enclosure 1 dated 30 March 2021 is the appellant/plaintiff's notice of appeal against the whole of the decision (liability, quantum and costs) of the Kuching High Court Civil Appeal No KCH-12B-3/7 of 2020 delivered on 5 March 2021 whereby the learned judicial commissioner ordered as follows:

(a) The appellant's/plaintiff's appeal is disallowed except with regards to interest awarded to the appellant/plaintiff, that is:

(i) 5%pa on special damages from the date of accident until date of judgment;

(ii) 5%pa on general damages from the date of service of summons until date of judgment; and

(iii) 5%pa on total judgment sum from the date of judgment until date of full settlement.

(b) The respondent's/defendant's cross-appeal is dismissed; and

(c) There is no order as to costs on the appellant's/plaintiff's appeal

[2] The appellant will be referred to as the plaintiff and the respondent as defendants respectively in this judgment.

BRIEF FACTS

[3] The estate of the deceased (plaintiff) is claiming from an accident that took place along KM10 Jalan Bau/Lundu on 7 January 2015 at about 3.25pm involving a motorcycle bearing registration number QAA6407B ('said motorcycle') ridden by Frank Harvey ak Frankie Riya (deceased) and a motor vehicle bearing registration number QAA2878D driven by Hermansyah bin Amran (defendant) the insured driver and the registered owner of the said car ('Perodua Viva'). The deceased died as a result of the said accident.

[4] The plaintiff's version is that defendant was driving at a high speed manoeuvring a bend hence encroaching into the deceased's lane causing the collision.

[5] The defendant on the other hand alleged when the defendant was manoeuvring the right bend, the deceased suddenly encroached onto his lane while skidding and rammed onto his Perodua Viva and knocked the frontal right side of his car.

IN THE SESSIONS COURT

[6] The learned sessions court judge held as follows:

(i) Liability be apportioned equally between the deceased and the defendant.

(ii) The defendant do pay the plaintiff as follows:

(a) Bereavement in the sum of RM5,000 (half of the claim).

(b) Dependency claim in the sum of RM86,4000 (half of the claim).

(c) JPJ search in the sum of RM5 (half of the claim).

(d) Police documents in the sum of RM18 (half of the claim).

(e) Medical report in the sum of RM20 (half of the claim).

(f) Cost of funeral arrangement and coffin in the sum of RM1,890 (half of the claim).

(g) Claim of personal effect in the sum of RM225 (half of the claim).

(h) Traveling allowance of 4 witnesses in the sum of RM750 (half of the claim).

(iii) Interest at the rate of 5%pa from the date of the judgment sum to the full payment.

(iv) Costs in the sum of RM10,000 to the plaintiff.

IN THE HIGH COURT

[7] Dissatisfied, the plaintiff appealed to the High Court against the decision of the sessions court via notice of appeal dated 20 July 2020 and the defendants cross-appealed via notice of cross-appeal dated 7 August 2020.

[8] Based on the above, except for the interests to be awarded to the plaintiff, the learned judicial commissioner affirmed the finding made by the sessions court on the issue of liability and quantum.

OUR DECISIONS LIABILITY

[9] The plaintiff contended that the learned judicial commissioner's failed to appreciate that the whole evidence and the sketch plan which supports the plaintiffs version of the accident, that is the car had encroached into the lane of the motorcycle when negotiating the right bend on the road.

[10] It was revealed in evidence that the road was wet and slippery. The investigating officer and defendant himself confirmed that the road was wet and slippery and the deceased was dragged 38 meters away from the debris of the accident. This fact was never challenged by the defendant.

[11] The defendant contended that the motorcycle was already in skidding position before the collision. That the road was indeed wet and slippery which could be a possible scenario causing the deceased to slid towards the defendant's viva. That there were no tire marks found on the deceased's body as confirmed by PW3 and that it was probable that the deceased could not have been dragged by the defendant's car.

[12] On the conflicting versions of the accident, the learned judicial commissioner in her grounds of judgment held among others as follows: A

> [9] The appellant's version on the incident was that the respondent was driving at a high speed while manoeuvring a bend hence encroaching into the lane of the deceased causing the collision. The respondent on the other hand told the court that the deceased skidded and fell causing the unmanned motorcycle to go into his path of way and knocked the frontal right side of his car and followed by the deceased who slid on the wet and slippery road towards his car when he fell off the motorcycle. B
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> [10] Further, the silent evidence that the court need to look at would be the sketch plan ie exh P2(5). From the sketch plan and the location where the debris were mostly found, I am of the view that the collision would have more likely could be said to occur at the respondent's lane for most of the debris were found there. Furthermore, judging from the position of the motorcycle which were not far from the debris area, the motorcycle could have slide to the side of the road after the impact hence supporting the fact that the collision occurred on the respondent's lane. C D
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> [11] As for the body of the deceased being found in front of the respondent's car, in view of PW3's statement that there were no traces of the car tyre on his body, it therefore, precludes the possibility of the body being dragged. Instead, the deceased could have been flung backwards upon impact with the respondent's car and ended at that position where the respondent's car stopped. E
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> [12] The damages to the respondent's car concentrated towards the right frontal headlamp hence suggesting it was a head on collision between them. This precludes the defendant's version that the deceased fell on his own or his motorcycle skidded and knocked his Perodua Viva for if the motorcycle skidded and the deceased fell before reaching his vehicle, the motorcycle would have hit the Perodua Viva in a lying down position making the damages concentrated to the lower part of the car instead. F
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> [13] The respondent is said to have stopped his car about 38 meters from the debris ie 38 meters from the point of impact area. After reading the submissions, the grounds of decision of the SCJ and viewing the sketch plan, my take of the incident would be that either the respondent did encroached into the lane of the deceased when he was manoeuvring the bend or vice versa and upon seeing this both parties tried to avoid hitting each other hence each tried to control the motion of their vehicle by swerving to the left and right but at the middle or more towards the white line in the middle of the road they came into contact and that is why the damage is concentrated only to the right frontal part of the car at the headlamp area. They both saw each other and both tried to avoid the collision. G H
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> [14] The impact between the two vehicles must have flung the deceased backwards and the respondent's car managed to stop some 38 meters later right in front of the deceased body as the car was still staggering from left to right in order for the respondent to be able to take control of the car after the impact with the motorcycle. I
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> [15] Having said the above, that would be the most probable scenario that happened given the police report lodged by the respondent a mere 41 minutes after

the incident. All the other versions given by the respondent during trial were him trying to avoid being blamed for the collision. It follows that the SCJ were correct in deciding that the liability should be equally shared by both parties in this matter.

[13] Due to the different versions of the accident, hence it is important for us to evaluate which version was inherently probable or improbable. This is in line with the decision made in the Court of Appeal case of *Ahmad Zulfendi bin Anuar v Mohd Shahril bin Abdul Rahman* [2022] 4 MLJ 892 where Mohd Nazlan JCA delivering the judgment of the court held that:

> [17] We are mindful that this is consistent with the principle pronounced in the case of *Noorianti Bte Zainol Abidin & Ors v Tang Lei Nge* [1990] 2 MLJ 242 ; [1990] 1 CLJ 943 where the High Court held that the court should not approach the case on the basis of deciding which of the conflicting versions ought to be believed — but rather to evaluate which account was inherently probable or improbable.

[14] In somewhat similar situation, the Court of Appeal in *Muhammad Nur Aizzat bin Mohd Yunos v Amir Hamzah bin Abd Razak & Ors* [2023] 3 MLJ 379, speaking through Lim Chong Fong JCA said:

> [25] The learned judicial commissioner referred and relied on the case of *Chong Keow v Shaari Yaacob* [1987] MLJU 5; [1988] 1 CLJ Rep 463 wherein Lim Beng Choon J held as follows:
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> > The existence of two conflicting versions of how an accident occurred (as it happens here) is typical in almost all motor vehicle accident cases. In such a situation, I will have to carry out a searching evaluation and assessment of the totality of the oral evidence and also to resort to the documentary evidence in order to find out the truth. In my attempt to uncover the truth in order to arrive at a just decision, I must not lose sight of the principle that in assessing the evidence of the parties in a suit, it is not merely a question of whom to believe but rather whose version is more inherently probable which is the prime consideration and concluded that the learned sessions court judge had duly weighed and evaluated all the evidence by the witnesses including their credibility and ultimately found that the appellant failed to prove his case because his version is inherently not probable.

[15] Having appraised ourselves of the relevant documentary evidence before us, the oral and written submission made by the learned counsels, we unanimously find that there was no misdirection on the part of the learned judicial commissioner that warrants appellate intervention. We are in no hesitation to conclude that there is no merit in this appeal. Hence, we find no reason to disturb the well-reasoned findings of sessions court and High Court on liability.

QUANTUM

[16] The learned judicial commissioner then analysed the evidence and concluded, inter alia, as follows:

> [16] Moving on to the quantum appealed by the appellant, on the first point being the dependency claim, There Is no doubt the deceased's wife is entitled for the same but what needs to be determined is the sum to be awarded. There were no supporting documents tendered by the appellant to show that she did indeed received the sum of RM2,000 per month from the deceased and the salary slip of the deceased for January 2015 ie exh P2(5), showed that his net pay at the time of his death was RM1,761.01 only. Therefore, the SCJ were right in his calculations of giving a sum of (RM900 x 12) x 16 = RM172,800 and because of the liability shared, the appellant is therefore entitled to only half of the sum being RM86,400.
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> [17] In respect of the funeral expenses claimed at RM5,000 by the appellant, this were not supported by any documentary evidence for if the same were incurred by the appellant, surely a receipt to show this expense could be produced by the appellant at trial for the consideration of the court. In the absence of the supporting receipts or evidences related thereto, I have to concede with the findings of the learned SCJ.
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> [18] Similarly, on the food and beverages incurred for the seven days wake and prayer, the 40th day prayers after the burial, the 100th day prayer after the burial and for the anniversary prayers in 2016, 2017 and 2018, again these expenses were not supported by any documentary evidence to justify the figure claimed.
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> [19] Lastly as to the interest to be awarded, I am with the appellant's learned counsel on this for the interest normally awarded in a running down case are as follows:
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> (a) 5%pa on special damages from date of accident until date of judgment.
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> (b) 5%pa on general damages from the date of service of summons until date of judgment;
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> (c) 5%pa on total judgment sum from the date judgment until date of full settlement.

[17] In respect of quantum, we shall vary the above decision as follows:

[18] In addition to the receipted expenses granted by the sessions court and High Court, we are of the view that unreceipted expenses for the funeral such as prayer expenses should have been granted by taking judicial notice of the same. We shall grant only RM5,000 for this item. The other expenses granted by the sessions court and High Court are affirmed and maintained.

[19] As for appeal against the multiplicand of RM900 used by the sessions court in assessing loss of dependency, we find that the sessions court erred. We note that even counsel for defendant suggested a slightly higher multiplicand. We also find that the sessions court judge erred when he made a 1/3 deduction

for vicissitudes of life which has been built inside the multiplier. In our view, the sum of RM349 should have been added to what the deceased gave his wife as it was directly paid to her by the Army. On the evidence, after taking into consideration this sum and the roughly RM1,000 paid to the widow for expenses, the multiplicand should be RM1,350.

[20] The plaintiff should be entitled 50% of the above having regard to the apportionment of liability. The final judgment sum is to reflect the above variation. No order as to costs.

Appeal on liability dismissed; and appeal on quantum allowed partially.

Reported by Ashok Kumar